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In the Supreme Court of the United States

OCTOBER TERM, 1961

NORTHERN VIRGINIA SUN PUBLISHING COMPANY, A CO-PARTNERSHIP COMPOSED OF GEORGE W. BALL, PHILLIP M. STERN, ARNOLD SAGALYN AND CLAYTON FRITCHEY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a–31a) is not yet reported. The Decision and Order of the National Labor Relations Board are reported at 134 NLRB No. 109.

JURISDICTION

The order of the court of appeals denying the petition for a writ of mandamus was entered on January 30, 1962 (Pet. App. 32a–33a). The petition for a writ of certiorari was filed on February 21, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitions to review an order of the National Labor Relations Board were filed in two courts of appeals several hours apart on the same day. The question presented is whether, in these circumstances, the court in which the proceeding was "first instituted," within the meaning of 28 U.S.C. 2112(a), should be determined by ascertaining which petition was filed earlier on the particular day or both petitions should be deemed simultaneously filed and proceedings then given to the circuit in which the unfair labor practices took place.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 34a–37a of petitioner's appendix.

STATEMENT

On December 7, 1961, the Board issued its Decision and Order (134 NLRB No. [redacted], 49 LRRM 1268), finding that petitioner Company had engaged in certain unfair labor practices but not in others. The Board found that the Company had discriminatorily laid off or discharged fourteen employees in violation of Section 8(a)(3) of the National Labor Relations Act. It further found that a subsequent strike engaged in by ten other employees was caused by these unfair labor practices. The Board, however, found that the refusal to hire four named "extra" employees was not violative of the Act, nor was the Company's action in changing work schedules. The Board's order di-

rected the Company to cease and desist from the unfair labor practices found and to reinstate, and make whole, the employees discriminated against, and, upon application, the strikers. The order also limited the back pay awarded for certain of the discriminatees whom the Board found had refused valid offers of reinstatement, and dismissed the allegations of the complaint which were not sustained.

At 10 a.m. on December 7, 1961, copies of the Board's Decision and Order were handed to counsel for all the parties, at the Board's offices in Washington, D.C. (Pet. App. 21a). Fifty minutes later, counsel for the discriminatees—the charging parties before the Board—filed a petition, pursuant to Section 10(f) of the Act, in the Court of Appeals for the District of Columbia Circuit to review those portions of the Board's order adverse to them (Pet. App. 21a). Later the same day, counsel for the Company filed a petition in the Court of Appeals for the Fourth Circuit to review those portions of the Board's order adverse to it *(ibid.)*.

Thereafter, the Board informed the Company, upon the latter's inquiry, that it intended to file the certified list of the materials comprising the record in this Board proceeding (which is filed in lieu of the physical record) in the District of Columbia Circuit, pursuant to the provisions of 28 U.S.C. 2112(a), which requires filing of the record in the circuit where a proceeding was "first instituted." (Pet. App. 10a). The Company then filed a petition for a writ of mandamus in the Fourth Circuit, requesting that the

Board be directed to file the certified list in that court rather than in the District of Columbia Circuit. The Company contended that the term "first instituted" in 28 U.S.C. 2112(a) does not contemplate taking into account fractions of a day, and that accordingly when two petitions are filed on the same day it is necessary to fall back on the policy of Sections 10(e) and (f) of the National Labor Relations Act, which creates a preference for judicial review in the circuit in which the unfair labor practices were committed (Pet. App. 1a-8a).

On January 30, 1962, the Fourth Circuit denied the petition for a writ of mandamus and ordered that the Company's petition to review be transferred to the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a). The court held that the language and history of this provision reveals Congress' intention "to accord priority to that court in which the petition is actually first filed, leaving it to the court to consider any claims based upon the 'convenience of the parties in the interest of justice'" (Pet. App. 31a).

ARGUMENT

The decision of the court below is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is thus presented.

1. Section 10(f) of the National Labor Relations Act gives any "person aggrieved by a final order of the Board" the right to obtain review in the court of appeals in the circuit where the unfair labor practices were committed, where the person resides or

transacts business, or in the District of Columbia Circuit (where the Board has its main office). Two persons were aggrieved by the Board's order in this case, the Company and the charging parties, and each petitioned for review in a different circuit—the former in the circuit where the unfair labor practices were committed and the Company did business,[1] and the latter in the District of Columbia. Congress has provided in 28 U.S.C. 2112(a) that, where multiple petitions are filed, the agency "shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted," and the other courts shall transfer their proceedings to the court "in which the record has been filed." The statute further provides that: "For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals." The narrow question in this case is, in what court is a proceeding "first instituted" when multiple petitions are filed in two courts on the same day. The court below concluded that it was the court in which a petition "is actually first filed," taking into account the hour and minute of the respective filings. Petitioner, on the other hand, contends that petitions filed on the same day should be regarded as equal in time, and that a preference should be given to the circuit in which the unfair labor practices were committed.

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[1] The unfair labor practices found were committed in Arlington, Virginia, where the Company, a partnership, is engaged in the publication of a newspaper (Pet. App. 21a).

We submit that there is no warrant for petitioner's interpretation of 28 U.S.C. 2112(a). The specific language of 28 U.S.C. 2112(a) makes the time the respective petitions are filed the sole basis for determining the priority of proceedings which, under Section 10(f) of the Act, may properly be brought in several different districts. The phrase "first instituted" normally means first in time. Indeed, petitioner so concedes when petitions are filed on different days. But the statute suggests no different standard to be applied when the petitions are filed on the same day. A proceeding brought at 10:50 a.m. is certainly "first instituted" *vis-à-vis* a proceeding brought in the afternoon.

The legislative history of 28 U.S.C. 2112(a) shows, as the court of appeals found, that Congress desired that "a judgment as to what forum will be most convenient to the parties [should] be made by a court and not by the agency whose order is under review," and that "the court which is to make that decision [should be] determined by a fixed rule of thumb—it shall be that court in which the petition for review was first filed" (Pet. App. 27a). To interpret "first instituted" as requiring that priority be based on the time the petitions were filed, where successive petitions are filed on the same day, just as when they were filed on different days, furthers this objective. It is a fairly mechanical process to determine the hour and minute when a petition has been filed and therefore which forum enjoyed priority in time; the agency could thus discharge its function with a minimum of discretion, file the record in the

court having the earliest petition, and then leave the court with the task of deciding whether "the convenience of the parties" or "the interest of justice" (28 U.S.C. 2112(a)) would require that the proceeding be transferred to another forum.

2. Petitioner's contention (Pet. 9–17) that the "hour and minute test" tends to create a preference in favor of the District of Columbia Circuit, contrary to the policy of Sections 10 (e) and (f) of the Act, is without merit. First, as the court below properly concluded (Pet. App. 28a–30a), there is nothing in the terms or history of those provisions which suggests that Congress desired to channel a review proceeding brought by the aggrieved party into the court of appeals where the unfair labor practice was committed or the respondent resides. Petitioner emphasizes that Section 10(e) permits the Board to petition to enforce its order in only those two forums, while Section 10(f) gives an aggrieved person, if he elects to institute the proceeding instead of waiting for the Board, the additional option of bringing the case in the District of Columbia Circuit. But this comparison of Sections 10 (e) and (f) shows that Congress in Section 10(f) desired "to ease the situation of a losing party desiring review"; that is, it denied the Board the power to force that person to come to Washington, but, at the same time, afforded him the opportunity to do so if he desired (Pet. 29a).

Second, the extent of the preference which the hour-and-minute test would create in favor of the District of Columbia is highly speculative. In the normal situation, where the Board decision is mailed to the

parties instead of being handed to them at the Board's Washington office (as was done here), they would be in a position to file in their "home" circuit perhaps even more quickly than a petition could be filed in the District of Columbia. Moreover, even assuming that it is easier to file first in the District of Columbia Circuit, it does not follow that the case will remain there. If a party is able to persuade that court—and this opportunity is open to petitioner here—that the case ought to be transferred to some other circuit for "the convenience of the parties in the interest of justice," the court of appeals has power under 28 U.S.C. 2112(a) to do so.

Finally, whatever preference the hour-and-minute test may create in favor of the District of Columbia Circuit, we have seen above (pp. 6-7) that the test effectuates the purpose of 28 U.S.C. 2112(a).

3. The interpretation of 28 U.S.C. 2112(a) by the court below is consistent with that underlying the decision of the District of Columbia Circuit in *Local 833, United Automobile Workers* v. *National Labor Relations Board (Kohler Co.)*, 47 LRRM 2609 (November 23, 1960), certiorari denied, 365 U.S. 869. There, as here, multiple petitions to review the same Board order were filed on the same day in two different

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[1] The District of Columbia Circuit granted a motion to transfer in *Local 2074, Carpenters* v. *National Labor Relations Board (Butcher Boy Refrigerator Door Co.)*, 47 LRRM 2688 (September 16, 1960). It has denied such motions in *Local 833, United Automobile Workers* v. *National Labor Relations Board (Kohler Co.)*, 47 LRRM 2609 (November 23, 1960), certiorari denied, 365 U.S. 869, and *Brewery Workers* v. *National Labor Relations Board (Gulf Battlers, Inc.)*, 47 LRRM 2688 (October 3, 1960).

circuits 35 minutes apart. The Board, finding that the petition filed in the District of Columbia Circuit was first under the hour-and-minute test, so advised that court and the Seventh Circuit (the other court involved), and proceeded to file the record in the District of Columbia Circuit. The Company then moved the latter court to transfer the case to the Seventh Circuit, which motion was denied. Implicit in this ruling, and in the Seventh Circuit's subsequent transfer of the petition before it to the District of Columbia, is an acceptance of the hour-and-minute test for determining, for purposes of 28 U.S.C. 2112(a), the court in which the proceeding was "first instituted." See also the Board's Brief in Opposition to Certiorari in *Kohler Company v. Local 833, UAW*, No. 707, Oct. Term, 1960, pp. 9-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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